Minister of Justice
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Ministre de la Justice
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CANADIAN HUMAN RIGHTS ACT AMENDMENTS

BACKGROUNDER

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ISSUE

The Canadian Human Rights Act (CHRA)is being amended in order to make it fairer and more effective. Substantive changes are proposed, as a response to changing social and economic realities.

HISTORY

The Canadian Human Rights Act was enacted in 1977. It was designed to provide an informal and effective process of resolving discrimination complaints in areas of federal jurisdiction. The Canadian Human Rights Commission was established at that time, to investigate complaints under the CHRA. Cases that the Commission's investigation does not resolve can be adjudicated by independent Human Rights Tribunals.

In the years following the CHRA's enactment, a number of parliamentary subcommittees, court decisions and Canadian Human Rights Commission Reports suggested amendments to the CHRA.

In response, in March 1986, the Minister of Justice tabled Toward Equality, which announced an overall review of the Canadian Human Rights Act. The review's goal was to ensure the complaint process was fair to all parties.

The Minister of Justice and Department of Justice officials have since met with a wide array of groups interested in the CHRA's provisions. The proposed amendments represent a balanced approach to the resolution of the diverse concerns represented by these groups. They also advance the interest in fairness and efficiency of the human rights process agreed to by all.

PROPOSED AMENDMENTS

1. Substantive Changes

Sexual orientation

The Government proposes to add sexual orientation as a prohibited ground of discrimination. This amendment will ensure that members of the homosexual community receive the same basic human rights protection in employment and services as do other Canadians.

The amendment is in keeping with the promise made by the Government of Canada in Toward Equality. It will bring the Canadian Human Rights Act into conformity with Section 15 of the Canadian Charter of Rights and Freedom. Section 15 does not expressly protect homosexuals, but several courts have held that it does so implicitly.

The amendment also brings the federal law in line with the human rights statutes of several jurisdictions, i.e. the provinces of Quebec, Ontario, Nova Scotia and Manitoba, New Brunswick, British Columbia and the Yukon Territory, which already prohibit discrimination on the basis of sexual orientation.

Definition of marital status

The Government proposes to add a definition of marital status to the Act, which would specify that marital status refers only to heterosexual relationships. This definition conforms to the traditional understanding of this term.

Reasonable accommodation

The Government proposes amending the bona fide occupational requirement (imposed in good faith by the employer) and the bona fide justification defence (a reasonably necessary distinction for their business made in good faith) under Act. This requires employers and providers of services to accommodate persons with disabilities and other groups covered by the Act, except in cases where such accommodation would cause undue hardship.

The reasonable accommodation amendment is in keeping with the Government's stated goals in the 1991 National Strategy for the Integration of People with Disabilities. It also fulfils a commitment made by the government in Toward Equality. Operational effectiveness of the Armed Forces will not be affected.

Exemption for religious and similar organizations

A special provision, similar to provisions in a number of provincial human rights codes, will be inserted in the Act, stating that religious and other similar groups such as cultural organizations may preferentially hire members of their own religion, race or other group served by the organization.

Mandatory retirement

The Government proposes to abolish the blanket defence for mandatory retirement. Employers will continue to be permitted to use the bona fide occupational requirement defence to justify mandatory requirement policies.

A transition period will follow the proclamation of the amendment. Transitional rules will be provided during this period, to allow employers and unions to adjust pension plans, related benefits and collective agreements. The impact of the amendment will be carefully monitored by the Minister of Justice in consultation with industry and unions.

The amendment honours the Government's commitment to the abolition of the blanket defence for mandatory retirement, made in Toward Equality. It also follows a major recommendation of the 1988 Commons Report on Human Rights and Aging, and is in conformity with the policy of the National Advisory Council on Aging.

Indian Act

The provision that exempted the Indian Act from the CHRA will be removed.

2. Administrative and Procedural Changes

Elimination of the power to make binding guidelines

Currently, the Human Rights Commission issues guidelines for the application of the Act, which are binding on the Tribunals (i.e. the Tribunals must abide by them). However, this causes certain important problems.

Firstly, it creates a potential conflict of interest, because the Commission is an advocate before the Tribunals, usually in opposition to the respondent. It should not be making guidelines that determine how the case it is a party to, is resolved.

Secondly, binding guidelines potentially inhibit independent decision-making by the Human Rights Tribunals, who adjudicate cases, as well as restricting the evolution of the law in new and developing areas.

The Government proposes to make the guidelines non-binding. This way, the Commission can still provide guidance, while allowing the law to develop. The current equal pay guidelines will remain in force.

Increase in compensation awards

At present, Tribunals may award amounts of up to $5,000 for wilful or reckless discrimination, or for emotional suffering. The maximum limit has not been adjusted for several years.

The Government proposes raising the award limit to $10,000 for wilful or reckless discrimination, or for emotional suffering.

Maximum fines

Currently, employers and unions may be fined up to $50,000 for obstructing a Tribunal or a human rights investigator. Employers or unions may also be fined up to $50,000 for intimidating a complainant or witness. All others are only subject to fines up to $5,000.

The Human Rights Commission views the difference in fines as an anomaly that should be changed. The Government proposes making the $50,000 fine applicable to all.

PRIMACY OF THE CANADIAN HUMAN RIGHTS ACT

The Supreme Court of Canada, in Winnipeg School Division No.1 vs. Craton, ruled that human rights legislation generally has primacy over other laws, except where there is a "clear legislative pronouncement" to the contrary.

In Toward Equality, the Government expressed agreement with the Supreme Court's decision. It also proposed to investigate the necessity of amending the Act to say so, given the Court's ruling.

After a review of the Craton decision and more recent court decisions, the government has decided that it would be desirable to codify the principle of primacy. This will strengthen the CHRA. The CHRA's authority will not, however, prevail over the Canadian Bill of Rights and the Official Languages Act, since it is felt that each of these three statutes should have equal priority. The Canadian Human Rights Act will be harmonized with the Canadian Charter of Rights and Freedoms by providing for limits on its provisions that are judged to be reasonable in a free and democratic society.

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